IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 69

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF INDIANA, et al.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR CORPORATE APPELLEES

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The Supreme Court of Indiana rendered its final judgment reversing the judgment of the Randolph Circuit Court of Randolph County, Indiana (R. 196). The appellant (appellee below) petitioned for a rehearing (R. 214) and on March 25, 1947 the petition for rehearing was denied (R. 220). Thereafter an appeal to this court was prayed and the appeal was allowed (R. 228).

The Indiana Supreme Court adjudged that an order of the Public Service Commission of Indiana was valid and was issued by way of asserting the jurisdiction of the Public Service Commission of Indiana, over, and the right, power and duty of said commission to regulate, appellant's

sales and service of natural gas to ultimate consumers of that product in Indiana for use by such consumers at the burner tips although such gas was gathered in other states and transported to Indiana by the appellant for the purpose of serving it to such ultimate consumers.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana (R. 196) has not been officially reported but is unofficially reported in 71 N. E. (2d) 117 and at 67 P. U. R. (N. S., 1947) 129. The appellant incorporated a written opinion of the Judge of the Randolph Circuit Court which was announced at the time the judgment was rendered by that court as Appendix B to its statement showing jurisdiction of this court in this appeal.

The finding and opinion of the Public Service Commission of Indiana, dated November 21, 1945, which was announced in connection with the issuance of the order complained of in this appeal, have not been officially reported but are set forth at R. 127-173. The first supplemental order, dated April 9, 1946 (R. 180), is reported in 63 P. U. R. (N. S., 1946) 309.

JURISDICTION

Probable jurisdiction of this court was noted May 19, 1947 (R. 235). Jurisdiction was invoked under Sec. 344 (a) of Title 28 of U. S. C. A. (Sec. 237 of the Judicial Code, as amended) (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54).

In this connection it may be stated that the office of the Attorney General of Indiana has taken the position that the United States Supreme Court has no jurisdiction to decide this appeal on the ground that no substantial federal question is involved and for the reason that only in-

formation is asked for in this order and the right of the Public Service Commission of Indiana to regulate Panhandle's sales to ultimate consumers in Indiana is not necessarily involved. The corporate appellees have at no time participated in that controversy.

All the corporate appellees were made parties to the hearing before the Public Service Commission (R. 116) and all the parties were made defendants in the action in the Randolph Circuit Court with the right of appeal by order of that court. (R. 23 and R. 230 C.) Appellee Indiana Gas & Water Company, Inc., is the successor in interest of Public Service Company of Indiana, Inc. (R. 23).

STATE STATUTES, THE VALIDITY OF WHICH IS INVOLVED IN THIS PROCEEDING

The state statutes involved in this proceeding, the validity of which is under attack, are summarized at page 2 *et seq.* of appellant's brief. However, there is nothing in Chapter 53, Acts 1945; Section 54-601a Burns Revised Statutes 1945 Supplement (*) which is set forth in the appendix attached to appellant's brief at page 67 to justify the statement of appellant (p. 4) that "its principal purpose appears to be to vest in the commission control over competition in the sale of natural gas to industries through the requirement of a certificate of public convenience and necessity before any sale can lawfully be made." There is nothing in the amendment of 1945 to the Public Service Commission Act or in any part of the Public Service Commission Law of the State or in the Federal Natural Gas Act or the Federal Power Act to justify the statement that sales to industrial ultimate consumers are to be treated any differently than sales to any other class of ultimate

* In this brief the official publication of Indiana Statutes, i. e., Burns Indiana Statutes Annotated 1933 will be referred to as "Burns." When typographical emphasis is employed it will be that of these appellees unless otherwise indicated.

consumers are to be treated or that appellant can treat large customers any differently than it can treat small customers whether they be commercial, domestic or industrial ultimate consumers.

The State and Federal Statutes which have to do with further defining and limiting the jurisdiction of the State Public Service Commission and the Federal Power Commission will be referred to under the summary of the argument in this brief.

STATEMENT

APPELLANT'S INDUSTRIAL CUSTOMERS

Appellant's statement of the case from page 6 to 8 of its brief is accepted by these corporate appellees as sufficient except it is pointed out that the twenty-three industrial customers which are referred to as receiving gas from Panhandle at the time these proceedings were commenced before the Public Service Commission (R. 47), may be classified as follows:

Two were in Kansas, service to one having been commenced in 1935 and to the other in 1944 which was at or about the time these proceedings were commenced on October 13, 1944 (R. 3 and 4).

Thirteen were in Missouri. Service began to twelve of those before the appellant could know that the Supreme Court of Missouri would decide that the business of selling interstate gas to ultimate consumers in Missouri including industrial ultimate consumers as well as domestic and commercial ultimate consumers could be both taxed and regulated in Missouri in *Mississippi River Fuel Corp.* v. *Smith* (Mo. 1942), 164 S. W. (2d) 370, which in effect overruled *State ex rel. Cities Service Co.* v. *Public Service Commission* (Mo. 1935), 85 S. W. (2d)

890 and on which appellant has extensively relied in these proceedings. One of the Missouri industrial customers was connected in 1943 before the Supreme Court of Missouri had again in *American Bridge Co.* v. *Smith* (Mo. 1944), 179 S. W. (2d) 12 expressly and in detail followed and affirmed *Mississippi Fuel Corp.* v. *Smith, supra.* This service was also connected before the neighboring state of Arkansas had, in most eloquent language, expressly followed the principles for which we contend in the instant case, in *Arkansas-Louisiana Gas Co.* v. *Hardin* (Ark., 1944), 176 S. W. (2d) 903 and *Southern Kraft Corp.* v. *Hardin* (Ark., 1943), 169 S. W. (2d) 637.

Five were in Illinois. In three of these instances the sales to industrial ultimate consumers were by a distributing company and it is understood that Panhandle does not deny that these sales were subject to regulation by the Illinois Commission, although the selling company was wholly owned by Panhandle, the transporting company. Two of the Illinois companies were connected, one in 1943 and one in 1944, which was about the time the appellant decided to enter upon the program of getting all the direct industrial gas business they could get under the contention that they could render the service without regulation from any source.

One of the customers named in the list appearing at R. 47 was in Indiana—the Anchor-Hocking Company. Service was connected there in 1942 in a rural area (R. 51, Stipulation 21) and it was the commencement of that service which caused the commencement of these proceedings. (R. 5.) Since these proceedings were commenced Panhandle has commenced to serve in Indiana another industrial ultimate consumer located in a rural area (R. 129, Commission Finding 4), the DuPont Plant (R. 67 and 114).

Two of the industrial consumers were in Michigan. Service there was connected in 1943 and 1944 and the appellant's right to serve natural gas to those ultimate consumers is now before the Supreme Court of Michigan. (R. 47 and p. 65 of appellant's brief.)

FACTS SHOWING NATURE OF APPELLANT'S PRESENT AND PROPOSED BUSINESS IN INDIANA

The controlling facts in this case—the facts upon which the Indiana Supreme Court based its opinion herein are carefully set forth in that court's opinion.

The record in the Indiana Supreme Court consists of approximately 1250 pages. The parties stipulated all the evidence before the Public Service Commission. The stipulations were in the form of Stipulations of Facts numbered 1 to 42 (R. 37-66) with exhibits attached; and uncontradicted Stipulations of Evidence numbered 14 to 27 (R. 87-97) with exhibits attached. The parties hereto stipulated that the Findings of Facts of the Public Service Commission set forth at pages 16 to 50 of its printed order and numbered 1 to 29, inclusive (R. 126-149), correctly summarized the evidence introduced before the commission up to the hearing in the Randolph Circuit Court (R. 231) and such evidence was not contradicted in that hearing (R. 35). It is thought that these Commission Findings will enable the court to acquire conveniently a more accurate picture of the factual situation than will the very brief statement of evidence contained in appellant's brief.

Accordingly the commission's said summarized findings will be cited as support for any statement of fact herein and reference to the page of the record will be made where a commission finding supports a statement of fact men-

tioned either by the Indiana Supreme Court or by the corporate appellees. Each commission finding refers to the original evidence in support of that finding. The material facts are as follows:

"Appellee owns a large pipe line, through which it transports natural gas from Texas and Kansas into and across intervening states, including Indiana, to Ohio and Michigan. At different points along this line, gas is diverted into branch or lateral lines, smaller in size and at lower pressure, to be delivered to distribution systems owned and operated by various municipalities and public utility corporations and directly to selected, large industrial consumers of gas within practical distance of its through line." (R. 126 and 127.)

"When these proceedings started appellee furnished gas in Indiana to 10 utilities, including the corporate appellants, and four municipalities who, in turn, distributed such gas to 112,000 residential, industrial and commercial consumers in Indiana." (R. 135.)

"One of these laterals takes off from the main line near Winchester, Indiana, and at the end of this lateral there are two branches, one leading to a meter house, through which deliveries are made to Indiana-Ohio Public Service Company, which owns a distribution system serving Winchester and nearby territory. The other branch leads to another meter house, through which gas is delivered direct to the Anchor-Hocking Glass Corporation for its own consumption. Service to Anchor-Hocking is, and service to other large industrial consumers will be, under special, privately negotiated contracts, each upon terms agreed upon for its particular case." (R. 134 and R. 135.)

"Appellee's gas enters Indiana at a pressure of about 250 pounds per square inch in 22 inch mains. After reaching Indiana the pressure is reduced to approximately 200 pounds per square inch in 16 inch

mains. When the Winchester lateral leaves the main line, pressure is reduced to 80 or 100 pounds per square inch and there is no provision whereby it may ever be returned to the main line. Thereby it is segregated from the gas flowing interstate in the main line but the continuity of flow from the source to the meter houses is not interrupted. At the meter houses referred to pressure is again reduced and some deliveries are made to Anchor-Hocking at 40 pounds per square inch and some at 10 pounds per square inch. Deliveries are made to the Indiana-Ohio Public Service Company at 9 to 25 pounds per square inch. In both cases all facilities up to the pipe on the outlet side of the meter houses are owned and operated by appellee. The Winchester lateral is located in part on public highways in Randolph County pursuant to authority granted by the Board of Commissioners of that county to a predecessor of appellee which built the line. * * * appellee's main line and other laterals could not cross the state and branch out into the areas served without at least crossing highways and probably otherwise using same pursuant to arrangement with local governmental units." (R. 134 and 135.)

"The quantity sold to Anchor-Hocking is many times the quantity sold to the Indiana-Ohio Company." [(R. 134 and R. 135) Stipulation of Fact No. 3 (R. 35) and Stipulation of Fact No. 25 (R. 55).]

"Anchor-Hocking was the only industrial consumer in Indiana served direct by the appellee at the time of the commencement of these proceedings." (R. 134 and R. 135, Commission Findings 15 and 16.)

"Subsequently, however, service direct to a DuPont plant, near Fortville, Indiana, was undertaken under contract and appellee had adopted a policy of furnishing gas direct to selected large industrial consumers in Indiana, as it is doing in other states." (R. 176 and R. 20.)

"Before appellee began serving Anchor-Hocking, Anchor-Hocking had been buying its gas from a local

distributing utility which, in turn, had purchased it from appellee or its predecessor." (R. 51 or Stipulation of Facts No. 21.)

FACILITIES OF DISTRIBUTION GAS COMPANIES OPERATING IN INDIANA

"A compilation taken from the annual reports of the gas public utilities operating in Indiana under the jurisdiction of the Public Service Commission for the year 1943 shows that the book cost of gas plant (undepreciated), exclusive of common property used in other branches of the utilities business, is in excess of $85,000,000; that the total gas consumption in thousands of cubic feet was 48,356,978.5 and that the total gross revenues derived from such sales of gas amounted to $26,301,204.14. It also showed that of the total consumption above mentioned in thousands of cubic feet, industrial sales amounted to $30,323,524.8, or 62.71% of the total; and that of the gross revenues above mentioned, sales to industry produced $10,078,079.84, or 38.32% of the total. It also showed that the total number of consumers was 451,934 of whom 432,748, or 95.75%, were domestic consumers, 17,010, or 3.76%, were commercial and 1,242, or .028%, were industrial consumers (See Public Counsellor's Exhibit No. 1)." (R. 143 or Commission Finding of Fact No. 22.) Accepted by all parties as correct. (R. 231.)

THE PUBLIC USE TO WHICH PANHANDLE HAS DEDICATED ITS FACILITIES IN INDIANA

The use to which Panhandle is putting its facilities in Indiana and plans to place them in the future is shown by Points a to e following, which points are taken from the summary of the stipulated evidence set forth in the commission's findings of facts as No. 29 a to e, inclusive (R. 147-149), immediately following, which the appellant has stipulated are correct (R. 231).

a. Panhandle has declared to Kokomo Company that "Panhandle desired, and was planning in the future, to make all industrial gas supply contracts" to large industrial users "direct with the industrial consumers; that some arrangement would have to be worked out whereby the interest of Kokomo Company in such gas sales would be continued, but the ultimate consumer would no longer be a customer of Kokomo Company, but would be a customer of Panhandle; that if Panhandle sold direct to Continental Steel Corporation, the sale would not come under the jurisdiction of the Federal Power Commission; (fol. 187) and that such was the chief objective of Panhandle in making such contract direct with the industrial consumers." (Stipulation of Evidence, Section 14.) (R. 147 and R. 87.)

b. Panhandle solicited certain large industrial consumers of Service Company and stated to Service Company "that the Federal Power Commission had previously ruled that direct sales of gas to consumers of pipeline companies were not subject to regulation by such commission; that Panhandle desired to sell as much industrial load direct to industries as possible in order to remove this segment of its business from the jurisdiction of such commission; that Panhandle proposed to sell direct to industrial consumers at the points of inter-connection between the facilities of Panhandle and the present distributing utilities, that the facilities of the present distributing utilities would be utilized to transmit the natural gas for the account of the industrial consumers, who would reimburse the distributing utilities in an amount approximating the 20% of the rate being received by them on the sale of the interruptible natural gas; that present plans of Panhandle contemplated limiting the size of interruptible industrial consumers that Panhandle desired to serve direct to such consumers as had a monthly consumption of about 10,000,000 or more cubic feet of gas; and that he (Panhandle's representative) had been directed by Panhandle to outline the plan to the sepa-

rate industrial consumers now served with interruptible gas by Service Company." Panhandle declared to Service Company (fol. 188) and certain of its industrial customers that Panhandle "intended to serve directly other large industrial gas consumers up and down the pipe line of Panhandle." (Stipulation of Evidence, Sections 15 and 16.) (R. 147 and R. 89 and 90.)

c. Panhandle refused to make any contract with Central Gas for a supply of natural gas unless it "was based upon the policy that Panhandle should undertake at some time or other to serve directly some or all of these industrial consumers which are now being served by Central Indiana with natural gas purchased by Central Indiana Gas from Panhandle." (Stipulation of Evidence, Section 20); and Panhandle declared this policy in 1942 was the policy of the Board of Directors of Panhandle and that "its policy underlying that position, is to take over and serve directly such industrial customers which it refuses to serve through Central Gas." (Stipulation of Evidence, Section 21.) (R. 149 and 92.)

d. The Chairman of the Board and the President of Panhandle both stated "that Panhandle was interested in securing directly certain industrial customers of Central Gas, but on some basis which would make such direct service by Panhandle outside the jurisdiction of the Federal Power Commission under the Natural Gas Act. Said Mr. W. G. McGuire (Chairman of the Board of Panhandle) stated at such conference that Panhandle was anxious to take over such business (direct sales to industrial customers) because it was an unregulated transaction both as to the Federal Power Commission and the Public Service Commission of Indiana (fol. 189) and that he intended to establish industrial rates on a competitive fuel basis." Said representative of Panhandle stated that "Panhandle intended to take over direct service to certain large industrial consumers of Central Gas and any negotiations would have to be with that eventuality

in mind." (Stipulation of Evidence, Section 23.) (R. 149 and 93.)

e. Panhandle seeks to sell directly any industrial plant using natural gas in quantities agreeable to Panhandle and not to sell the gas to a distributing company for resale; and declares "it is our policy to serve as much of the load as direct as possible" and that "it is their policy to obtain any place on or adjacent to their system as much direct industrial gas as they can" because Panhandle contends such business is beyond regulation by any regulatory body or agency, thus enabling Panhandle to make as much money as possible from the business. (Transcript of Cross-Examination of Oscar W. Morton, Rate Engineer for Panhandle, before Federal Power Commission on February 26, 1945, as shown at pages 44 to 46, inclusive, of Transcript of Proceedings.) (R. 149.)

OTHER THREATS MADE TO APPELLEE DISTRIBUTING COMPANIES BY APPELLANT. ALL PARTIES STIPULATED THE COMMISSION FINDINGS CORRECTLY SUMMARIZED THIS EVIDENCE

(R. 231)

1. "Oscar W. Morton, a Rate Engineer of Panhandle, testified before the Federal Power Commission on February 26, 1945, substantially as follows: Panhandle would not willingly sell and deliver gas at Fortville, Indiana, for resale to the DuPont plant because they want to make as much money as they can out of that business and they can make more money selling gas directly than by selling it to someone, who, in turn, resells it and thus brings the transaction under the jurisdiction of the Federal Power Commission. If any other industrial plants than DuPont show an interest in obtaining gas, they would want to serve them directly (fol. 182) rather than serve them through the local distributing companies. It is the declared policy of Panhandle to secure as much of the

load as direct as possible (See Public's Exhibit No. 2 and the testimony of Mr. Morton copied therefrom)." (R. 143 or Commission Finding No. 23.)

2. "The development of its gas business in anything like its present proportion by Service Company has taken place almost wholly since natural gas was brought into Indiana by Panhandle, as hereinabove recited. This fact is illustrated by Service Company's Exhibit No. 1, which shows that for the year ended December 31, 1935, it had a total of gas customers of 41,245; whereas, at the year ended November 30, 1944, it had a total of such customers of 58,929 and that its average gas revenue per therm from residential customers went from $.2374 in 1935 to $.1576 for the twelve months period ended November 30, 1944 (See Service Company's 'Exhibit No. 1')." (R. 144 or Commission Finding No. 24.)

3. "It also appeared from Service Company's Exhibits No. 2 and 3 that if Service Company were to lose all of the gas revenues classified as industrial sales by reason of the pipe line company's furnishing the same, taking over those customers for direct service, it would mean loss in gross revenue in excess of $1,000,000 per annum based on figures for the twelve months period ending November 30, 1944, and for the same period, a loss in net operating income before provision for Federal Income Taxes of $293,730.22. And it appeared from testimony of Mr. Schiesz that in the event of that contingency happening, Service Company would only (fol. 183) be able to dispense with less than 2% of its gas utility plant property. If Service Company's industrial load should be lost to it by reason of the industrial customers being taken over by Panhandle for direct service, only about $100,000 of Service Company's investment in plant property could be retired and all of the remainder of its investment now devoted to gas service must be maintained and operated to serve Service Company's domestic and commercial users and the rates charged for service to the latter must necessarily be substantially increased

to justify continuing the service to them. (Service Company's Exhibit No. 1 and testimony of Mr. Schiesz)." (R. 144 or Commission Finding No. 25.)

4. "The fact that the distributing companies served natural gas to all three classes of gas consumers, i. e., industrial, commercial and domestic, has made possible a high standard of service at lower rates to the consumers in each of the three classes than would have been possible if only one of the classes had been served. It has meant that the residential and commercial customers have had the benefit of natural gas which would have been denied them unless the distributing companies' business had included service to all three classes of consumers. The installation of facilities to serve industrial consumers has made possible the development of domestic uses, including cooking and water heating, the higher B.T.U. gas for house heating and the use of gas for commercial cooking purposes by restaurants, hotels and others. All of these services under old methods were prohibitive in cost or the gas was not available in the quantities in which the customers (fol. 184) wished to use it, due to the inadequacy of facilities and of the supply of gas. It was through the development by the distributing companies of the industrial business that they have been able to improve materially the over-all load factor of gas purchased. This has also enabled the distributing companies to spread their fixed costs, such as interest, taxes and depreciation, which are constant in every-day operation, over a larger number of units of service, which automatically has given the benefit of that condition and fact to each of the three classes of consumers and has made possible the development of rates for service which were attractive not only to one of the three classes but to each of them; all of which has had the effect of promoting greater public interest in the area served by these distributing companies in the use of natural gas and in advancing the public welfare in those areas." (R. 145 or Commission Finding No. 26.)

5. "It appears from Central Gas' Exhibit No. 1 and the testimony with reference thereto of Guy T. Henry, its President (see pages 71 to 77, both inclusive, of the Transcript) that for the calendar year ended December 31, 1944, the total gross revenues from sales of gas of Central Gas amounted to $4,076,369.11; that its sale to industrial users grossed $2,677,265.74; that for the same period its net operating income, before provision for Federal Income Taxes, amounted to $683,393.58; that if Central Gas should lose all of its industrial customers by reason of their being taken over by Panhandle for direct service, it would have resulted in a loss in net revenues of $514,206.67 (see Central Gas' 'Exhibit No. 1' and the supporting schedules); that (fol. 185) if Panhandle were to take over all of the industrial customers of Central Gas for direct service, Central Gas would be able to retire only about 1% or 2% of its investment in plant property and would find it necessary to maintain and continue to use all of the remainder of its plant property in continuing to furnish service to its domestic and commercial customers; that Central Gas has approximately 26 industrial customers, each of which use in excess of twenty-five million cubic feet of gas per year, and which, in the aggregate, use approximately nine billion feet of gas per year and from which Central Gas obtains gross revenues of approximately two and one-half million dollars; that the 14 customers mentioned in Exhibit L to the Stipulation of Facts, being the Notice of Cancellation filed by Panhandle with the Federal Power Commission under date of May 18, 1943, were among such 26 industrial customers using approximately 90% of all of the gas sold by Central Gas to industrial customers; and that if Panhandle should take over this industrial business of Central Gas and serve the customers directly, it would certainly result in a substantial increase in the present rates of Central Gas to its domestic and commercial customers in order to enable it to continue to carry on its business and to pay a return on its investment." (R. 146 or Commission Finding No. 27.)

6. "It appears from Kokomo Company's Exhibit No. 1 and the testimony of its President and General Manager, Mr. Hahn, with reference thereto, that for the 12 months period ending December 31, 1944, its total gross revenues amounted to $485,170.41, of which (fol. 186) $198,630.79 was derived from industrial sales; that if these industrial sales had been eliminated that year, it would have resulted in a reduction in net operating income, before provision for Federal Income Taxes, from $128,157.86 to $21,755.78, a total loss of $106,402.08; that if the industrial business of Kokomo Company were taken over and served directly by Panhandle the amount of plant property which Kokomo Company would be able to retire would be so slight as to be almost negligible, a matter of four or five thousand dollars; and that it would further result in a considerable revision of its present rates to domestic and commercial customers." (R. 147 or Commission Finding No. 28.)

THE COMMISSION ORDER

The Commission Order is sufficiently summarized at pages 11 and 12 of appellant's brief (R. 171 to 173) and the Commission Supplemental Order reaffirming its jurisdiction to regulate the business appellant is conducting and purposes conducting in Indiana as shown by the evidence is sufficiently summarized in appellant's brief at page 13 (R. 180 to 190).

APPELLANT ACCEPTS INDIANA SUPREME COURT STATEMENT OF FACTS WITH ONE UNJUSTIFIED EXCEPTION

At page 14 of appellant's brief it is said that:

"Most of the pertinent facts are accurately stated in the opinion of the Supreme Court of Indiana (R. 196 to 198)."

Appellant apparently takes only one exception to that statement. It says:

> "That court, however, wholly ignored the evidence with reference to curtailment procedure and stated that there was nothing in the record to show that uniformity in the control of direct sales is necessary. (R. 207.)"

But the statement of facts set forth in the Indiana Supreme Court's opinion were entirely correct and did not overlook a vital point. The testimony of O. W. Morton, the appellant's engineer, is set forth at pages 174-176 of the Record. It had to do with the *transportation* of interstate gas, a process which is subject to the regulation of the Federal Power Commission as is expressly required by the language of the Federal Natural Gas Act, just as transportation is placed under the exclusive jurisdiction of that commission by the Federal Power Act. (This Act hereinafter specifically cited.) The Indiana Supreme Court correctly stated that "Uniformity in control of direct sales from interstate pipe lines to large industrial consumers does not seem to be necessary." (R. 207.) Congress felt that there should be federal regulation of the transportation in interstate commerce of interstate gas and electrical energy but saw no reason for federal regulation of sales to ultimate consumers which have always been regarded as a local matter and are to continue subject to local regulation until Congress sees fit to assume jurisdiction thereof.

QUESTIONS PRESENTED

A. Is the business the appellant is transacting and purposes transacting in Indiana—namely, the sale of gas to Indiana ultimate consumers—a public utility business which would ordinarily be subject to regulation by the State's Public Service Commission although the appellant

now says it does not now intend to serve domestic or commercial users but only industrial consumers of its own choosing?

B. If such business of the appellant is a public utility business which would ordinarily be subject to regulation by the Indiana Commission, does the fact that appellant transports the gas from beyond the state's borders and sells it in Indiana not to a distributing company for resale but direct to ultimate consumers prevent the State Commission from regulating such sales to ultimate consumers (under the alleged automatic operation of the commerce clause of the United States Constitution), although Congress has expressly refused to grant to the Federal Power Commission jurisdiction to regulate such sales to ultimate consumers? In other words, is it the law that neither the State Public Service Commission nor the Federal Power Commission can regulate appellant's business and proposed business in Indiana and that it will go unregulated by any governmental agency and the appellant can pick and choose its customers with no legal obligation to answer to any regulatory body for how it disposes of the natural gas it can gather in other states, bring to Indiana and sell to such ultimate consumers in this state as are acceptable to the appellant as customers?

SUMMARY OF ARGUMENT

A. Appellant's business and proposed business in Indiana is shown by the evidence to be a public utility business and is subject to regulation by some public agency.

1. "The term 'Public Utility' * * * shall * * * embrace every corporation * * * that * * * may own, operate, manage or control * * * *any* plant or equipment within the state for the production, transmission, de-

livery, or furnishing of heat, light, water or power * * * either directly or indirectly to or for the public. * * *" 54-105 Burns 1933.

2. Section 54-601 Burns 1933 requires that no license or permit shall be granted to any person, corporation, etc., to operate any equipment of any public utility as defined by Section 54-105 Burns 1933, in any municipality wherein there is already another public utility as so defined engaged in similar service without first securing a Certificate of Public Convenience and Necessity from the Public Service Commission of the State after a public hearing, and there is no language in the statute which would exempt Panhandle from such a requirement.

3. Section 54-603 Burns 1933 provides that no license or permit shall be granted to a corporation not duly organized under the laws of the State of Indiana and Panhandle is admittedly organized under the laws of the State of Delaware.

4. Chapter 53 Acts 1945, page 110 adds a new section to the Indiana Public Service Commission Act (Sec. 97a or Sec. 54-601a Burns Supp. 1945) and provides that no gas utility (which is defined by said Chapter 53 as meaning any public utility selling or proposing to sell gas directly to any consumer within the State of Indiana for its or their domestic, commercial or industrial use) shall sell gas in rural areas in which it was not selling on the effective date of the Act without first securing a "Necessity Certificate" authorizing such service and limiting the area covered thereby and stating that public convenience and necessity require such service. Said Chapter 53 does not expressly provide that a "Necessity Certificate" which is made by the 1945 Act the equivalent of an Indeterminate Permit, can only be held by an Indiana corporation.

5. The Indiana Public Utility Law provides that a public utility company rendering public utility service is subject to the jurisdiction of, and to regulation by, the State's Public Service Commission, whether or not such service is rendered pursuant to a Certificate of Public Convenience and Necessity or an Indeterminate Permit issued pursuant to the Public Service Commission Act.

City of Logansport v. *Public Service Commission* (1931), 202 Ind. 523, 540.

6. The regulation of a public utility is properly the function of the legislative department of the State government under the state's police power.

City of Logansport v. *Public Service Commission* (1931), 202 Ind. 523, 533.

7. In this proceeding it need not now be determined whether it would be a reasonable exercise of the state's power, and a proper discharge of its duty, to protect local interest in the business or commerce under consideration, if the Public Service Commission of the state were to issue an order forbidding Panhandle, a Delaware Corporation, to serve its gas to ultimate consumers in Indiana, until it has taken such steps as are necessary to get a Certificate of Public Convenience and Necessity or an Indeterminate Permit within the meaning of Sections 54-601, Section 54-603 and Section 54-604 Burns 1933, to serve gas in Indiana municipalities where another public utility or a municipally owned utility is lawfully engaged in a similar service; or until Panhandle gets a "Necessity Certificate" to serve in rural areas as provided in Chapter 53 Acts 1945. These questions are not decided or involved in the order in question by the express provision of the order itself.

The order could not be held illegal or void merely because it did not deal with all the matters which might have been dealt with at the time it was issued or because it was contemplated that additional matters might be dealt with at appropriate times in the future. (R. 172 and 173.)

THE COMMERCE CLAUSE

Even though Panhandle's sale of gas to Indiana ultimate consumers be regarded as interstate commerce, Congress does not have *exclusive* power to regulate or reasonably affect such interstate commerce. Congress is given power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes," but its power is not exclusive so far as the provisions of the United States Constitution are concerned. Article 1, Sec. 8, Clause 3 U. S. Constitution.

It is what Panhandle does and offers or threatens to do, not what Panhandle says, in its charter or other similar document, which determines its status as a public utility and subjects its activities to regulation by a properly constituted public agency. Panhandle can not be heard to say it only chooses to serve its natural gas to certain customers who are located within the territory wherein Panhandle actually serves merely because other customers may not be as profitable to Panhandle as the customers it chooses to serve. (*Terminal Taxicab Co.* v. *Kutz* (1916), 241 U. S. 252, 253; *Industrial Gas Co.* v. *Public Utilities Commission of Ohio* (1939), 135 Ohio State 408, 21 N. E. (2d) 166, 167; *United Fuel Gas Co.* v. *Railroad Commission* (1929), 278 U. S. 300, 309; *New York ex rel. New York and Queens Gas Co.* v. *McCall* (1917), 245 U. S. 345, 351.)

B. Appellant's sales to ultimate consumers in Indiana are subject to regulation by the Indiana Commission because Congress has refrained from entering the field and allowing the Federal Power Commission to regulate that business.

This last statement is true because such sales are of local importance as shown by the evidence and the sale to ultimate consumers of a commodity and its consumption locally have always been regarded as local in character and not an inseparable, integral part of interstate commerce. They may not constitute interstate commerce. They may only have an effect on interstate commerce. Mere bigness, the size of the sale, does not determine constitutional rights or obligations. The federal statutes (hereinafter specifically cited) recognize only two classes of sales of interstate gas and interstate electrical energy, namely, sales for re-sale which are expressly made subject to the jurisdiction of the Federal Power Commission and all other sales, i. e., sales to ultimate consumers which are naturally subject to the jurisdiction of the state commission. Regulation of public utilities by public authority is the exercise of the police power of the state and that police power resides in the various state governments at least unless and until Congress sees fit to enter upon the performance of such police duties itself and, under the commerce clause, to undertake the burden of regulating the business involved.

1. From the first briefing of this case before the Public Service Commission until this time, these corporate appellees have always insisted that it made no difference whether the appellant's sales to ultimate consumers in Indiana be regarded as intrastate commerce or interstate commerce. They are subject to Indiana regulation until the Federal Government enters the field and gives

the Federal Power Commission or some other federal agency the power to regulate such sales.

2. There are many cases and many courts which hold that where as here the transporting company removes gas from its interstate lines and reduces the pressure in Indiana and where there is no way by which the gas can flow back into the interstate mains but it finds permanent lodgement in Indiana in one or a series of lower pressure mains wherein it is held subject to the needs or demands of ultimate consumers, whether they be industrial, commercial or residential, the process of selling such gas to such ultimate consumers is intrastate commerce. This is what happens in the instant case and it is not for these appellees to say that the courts so holding are in error. (*East Ohio Gas Co.* v. *Tax Commission* (1931), 283 U. S. 465, 471; *Southern Natural Gas Corp.* v. *Alabama* (1937), 301 U. S. 148, 154 and 155; *Mississippi River Fuel Corp.* v. *Smith* (Mo., 1942), 164 S. W. (2d) 370, 373; *American Bridge Co.* v. *Smith* (Mo., 1944), 179 S. W. (2d) 12, 16; *Southern Kraft Corp.* v. *Hardin* (Ark., 1943), 169 S. W. (2d) 637, 641; *Arkansas Louisiana Gas Co.* v. *Hardin* (Ark., 1944), 176 S. W. (2d) 903, 905; *Connecticut Light & Power Co.* v. *Federal Power Commission* (1945), 324 U. S. 515, 533 and 534. (Construing and affirming the *Southern Natural Gas* and *East Ohio Gas* cases *supra* in an interstate electrical energy case.))

3. On the other hand many cases hold that the sale of interstate gas or electrical energy in a particular state, not for re-sale, but to the ultimate consumer continues to be interstate commerce but that fact does not deny to the state the right to regulate it until the federal government assumes the burden of doing so. This is true because the use of these commodities by the consuming public in the particular states have great local impor-

tance and it is the consuming public which in the final analysis the laws regulating public utility activity are designed to protect. (*Simpson* v. *Shepard* (Minnesota Rate Cases, 1912), 230 U. S. 352, 402; *Public Utilities Commission* v. *Landon* (1919), 249 U. S. 236; *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23, 28, 31; *Re Penn. Gas Co.* (1919), 225 N. Y. 397, 122 N. E. 260, 261, P. U. R. (1919C), 663, at special p. 664. (Opinion of Justice Cardoza); *Port Richmond and B. P. F. Co.* v. *Board of Chosen Freeholders* (1914), 234 U. S. 317, 321; *Lone Star Gas Co.* v. *Texas* (1938), 304 U. S. 224, 236; *Connecticut Light & Power Co.* v. *Federal Power Commission* (1945), 324 U. S. 515, 526; *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* (1924), 265 U. S. 298, 308; *State Corporation Commission* v. *Wichita Gas Co.* (1934), 290 U. S. 561; *Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83.)

4. In determining whether the Indiana State Commission can regulate the sale of gas or electrical energy gathered in another state, transported to Indiana and sold to an ultimate consumer in Indiana, the later view is that the question is not so much when the interstate commerce ends or intrastate commerce begins. *It is immaterial whether it be called interstate or intrastate business.* The question is, is it important to the local community that the commerce be regulated. If so, the state commission can regulate it at least until the Federal Government enters the field. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Commission* (1942), 314 U. S. 498; *Harvard Law Review September Issue 1945*, Vol. LVIII No. 7, p. 1072, p. 1074.

5. Congress has expressly disclaimed any intention of regulating sales of natural gas even though transported

in interstate commerce to ultimate consumers and has expressly provided that the Federal Power Commission's jurisdiction shall only "apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." Title 15, Sec. 717 (b) (U. S. C. A.) Federal Natural Gas Act; C. 556, Sec. 1, 52 Stat. 821.

6. The same intention on the part of Congress is shown with reference to the sale of electrical energy in interstate commerce. The jurisdiction of the Federal Power Commission "shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy." Title 16, Sec. 824 (b) (U. S. C. A.) Federal Power Act; C. 285, Sec. 201 Added August 26, 1935, C. 687, Title II, Sec. 213, 49 Stat. 487.

7. Congress has provided (specifically with reference to electrical energy) that the amount or volume however great, of the public utility product sold, shall not have the effect of changing a sale of such product from a sale to an ultimate consumer or a retail sale to a wholesale sale. In other words, a sale at wholesale means a sale for re-sale without regard to the volume of the product involved in the sale. There can be no doubt about the meaning of the language of the act of Congress which

uses the words "*sale for re-sale.*" Title 16, Sec. 824 (d) (U. S. C. A.) Federal Power Act.

8. In granting the Federal Power Commission jurisdiction over certain features of the interstate electrical industry in 1935 and in granting to that commission jurisdiction over certain features of the interstate natural gas industry early in 1938 it was by Congress made even clearer that the regulation of the local consumption of gas and electrical energy whatever its origin is of such local importance that each state has been recognized as having the power and right, and that a commission created for that purpose has the duty, to regulate the sale of these commodities to ultimate consumers, at least until and unless the Federal Government enters the field pursuant to the powers granted in the commerce clause. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.* (1942), 314 U. S. 498, 504-507; *Connecticut Light & Power Co.* v. *Federal Power Commission* (1945), 324 U. S. 515, 529; *Re Potter Development Co.* (1939, N. Y.), 32 P. U. R. (N. S.) 45.

9. The House Committee which reported the Natural Gas Bill for passage (*following which the bill was passed by both Houses of Congress*) in its report to Congress said that the states prior to the enactment of the Natural Gas Act had authority "to regulate sales to consumers even though such sales are in interstate commerce, said sales being considered local in character and in the absence of Congressional prohibition subject to state regulation" and that "there is no intention to disturb the states in the exercise of such jurisdiction." It was emphasized that the purpose of Congress was only to provide for the regulation of sales for re-sale, i. e., to distributing companies which the states could not regulate because such sales for re-sale "have been considered to be not local in

character and, even in the absence of congressional action, not subject to state regulation." See report House Committee reporting H. R. 6586 which contains the exact words of the Federal Natural Gas Act (Report No. 709, 75 Congress, First Session.) (R. 157 and R. 206.)

10. Recent Cases Showing that Congress Intends that All Sales of Natural Gas and Electrical Energy Shall be Subject to State Regulation Except Sales For Re-sale.

The United States Supreme Court has said that:

a

The Natural Gas Act was designed to take no authority from state commissions or in any manner to usurp state regulatory authority. *Federal Power Commission* v. *Hope Natural Gas Co.* (1944), 320 U. S. 591, 609.

b

The jurisdiction of the Federal Power Commission extends only to those matters which are not subject to regulation by the States. *Connecticut Light & Power Co.* v. *Federal Power Commission* (1945), 324 U. S. 515, 517.

c

There is no distinction under the Federal Power Act or the Federal Natural Gas Act between classes of ultimate consumers. Domestic, commercial and industrial consumers are each and all to be treated alike and a sale to one class is governed by the same principles and subject to the same regulations as a sale to either of the other two classes. *Colorado Interstate Gas Co.* v. *Federal Power Commission* (1945), 324 U. S. 581, 596.

d

In passing the Federal Natural Gas Act Congress intended to create a comprehensive plan of regulation which would be complementary in its operation to that of the states. Congress contemplated a harmonious dual system or regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere, with the Federal Power Commission regulating sales for re-sale and the state commissions regulating sales to ultimate consumers, in the respective states, whether these consumers be residential, commercial or industrial. *Public Utilities Commission* v. *United Fuel Gas Co.* (1943), 317 U. S. 456, 467.

11. From the beginning the United States Supreme Court has allowed the states both to tax and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if the sale is also necessarily the last sale because it is to the ultimate consumer. *Harvard Law Review September Issue 1945*, Vol. LVIII No. 7, p. 1082 and Note; citing: *Pennsylvania Gas Company* v. *Public Service Commission* (1920), 252 U. S. 23; *East Ohio Gas Company* v. *Tax Commission* (1931), 283 U. S. 465; *Public Utilities Commission* v. *Landon* (1919), 249 U. S. 237.

12. "The United States Supreme Court has always clearly drawn a line between sales *to consumers* and sales for resale—the former have always been subject to regulation by the state; the latter have not. The court has been consistent in finding "localism in the consuming end" and that "rates and receipts are local and not interstate." Article by Prof. Powell of the Harvard Law School in the *Harvard Law Review*, September, 1945, at pages 1082, 1084 and 1089.

13. INTERSTATE COMMERCE IN INSURANCE AND ITS REGULATION BY THE STATES

The business of insurance companies which issue insurance to policy holders in several states was, in 1944, declared to be interstate commerce and subject to Federal regulation and taxation. Nevertheless such business is subject to state taxation and regulation so long as state laws do not conflict with federal laws or regulations. *U. S. v. Southeastern Underwriters Association* (1944), 322 U. S. 533.

14. Panhandle should not be permitted to nullify Indiana's reasonable regulatory requirements designed to give important protection to Indiana consumers simply because Panhandle sees fit to do business in several states (at least until the Federal Government occupies this field of regulation); just as Indiana should not lose the power to protect the interests of its policy holders in large insurance companies doing an interstate business simply because those companies see fit to do business in several states; so long, at least, as Indiana does not run counter to Federal laws or regulations. *Hoopeston Canning Co. v. Cullen* (1943), 318 U. S. 313, 320.

15. There is a wide range of business and other activities which, though subject to Federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. The power of Congress to regulate interstate commerce does not exclude all state powers of regulation. *State v. Prudential Insurance Co.* (Ind. S. C., 1945), 64 N. E. (2d) 150, 153, 155. Not yet officially reported.

16. In limiting the jurisdiction of the Federal Power Commission to sales for re-sale, Congress must have intended to leave all other sales subject to regulation by

state commissions. Congress looks to coordinated action between the states and the Federal Power Commission just as, in the case of interstate commerce in insurance, it looks to cooperation between such regulation as Congress has provided and the various insurance commissioners of the states. *The Prudential Insurance Co.* v. *Benjamin* (1946), 328 U. S. 408, 430, 434 to 437.

17. Although the business be interstate commerce, the state not only has the right to tax but also to regulate the Indiana part of the company's business, so long as what is done is not contrary to Federal regulations or laws. The commerce clause does not give a person a right to ignore local regulatory laws applicable to local features of the commerce merely because that person does business in several states. If the Federal Government wishes to regulate the interstate commerce it may do so, but if the Federal Government does not provide for its regulation the several states may regulate those features of the commerce which are of peculiar local importance in the respective states until the Federal Government enters the field. *Robertson* v. *California* (1946), 328 U. S. 440, 448, 458-460.

18. The same thing precisely can be said of the Natural Gas Act as was said of the Federal Power Act by the Supreme Court in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission* (1946), 328 U. S. 152, 167. There the court said:

> "In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality

of control consists merely of the division of the common enterprise between two co-operating agencies of Government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue."

19. The indisputable facts in this case show that continued efficient service to domestic, commercial and small industrial users of natural gas and ultimately to large users of natural gas as well, in Indiana and all the other states will be placed in jeopardy if Panhandle is permitted to pick and choose its customers and to serve or refuse to serve those it pleases without regulation from any source. If this can be done as to interstate gas it can be done as to interstate electrical energy and thus state regulation of all such utility service is endangered. (Commission's undisputed findings Nos. 24 to 28, inclusive (R. 144-147 and R. 231(c)), which the parties have stipulated are correct.)

20. The commerce clause does not give to one engaged in interstate commerce the right to import into a state anything such person pleases free of a reasonable exercise of the police power of the particular state simply because Congress has not acted in the premises. *Robertson* v. *California* (1946), 328 U. S. 440, 458.

21. The same reasoning can be applied to the Federal Natural Gas Act as was applied to the United States Warehouse Act in *Rice* v. *Santa Fe Elevator Corp.*, 91 Law. Ed. (Adv. Op. No. 13) 1043. (Official opinion not yet available.) There at page 1049 the court said:

"Congress legislated here in a field which the States have traditionally occupied. See *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 148, 149, 88 L. ed. 635, 639, 640, 64 S. Ct. 474. So we start with the assumption that

the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

22. In the case last cited the majority opinion in no way conflicts with the following statement in the minority opinion, to-wit:

"Suffice it to say that due regard for our federalism, in its practical operation, favors survival of the reserved authority of a State over matters that are the intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State's claim is in unmistakable conflict with what Congress has ordered."

23. "A police regulation of local aspects of interstate commerce is a power often essential to a state in safeguarding vital local interests. At least until Congress chooses to enact a nationwide rule the power will not be denied to the state (Authorities)." *Freeman* v. *Hewit*, 91 L. Ed. (Adv. Op. No. 3), 205, 208. (Official opinion not yet available.)

24. The question is not whether the Public Service Commission *might* issue an order which would be invalid because in conflict with some federal law, rule or regulation. The question is, is the issuance of the order in question, as far as it goes, within the jurisdiction of the state commission. This principle is shown by *Rice* v. *Board of Trade*, 91 L. ed. (No. 13 Adv. Op.) 1058, 1062 (Official opinion not yet available), where the court said:

"Until it is known what rules the Illinois Commission will approve or adopt, it cannot be known whether there will be any conflict with the federal law. Any claim of supersedure can be preserved in the state proceedings. And the question of supersedure can be determined in light of the impact of a specific order of the state agency on the Federal Act or the regulations of the Secretary thereunder. Only if that procedure

is followed can there be preserved intact the whole state domain which in actuality functions harmoniously with the federal system. For even action which seems pregnant with possibilities of conflict may as consummated, be wholly barren of it."

25. In appellant's statement as to jurisdiction on appeal, and in the note on page 3 of appellant's brief, it cites *Northwestern Bell Telephone Company* v. *Nebraska State Railway Commission*, 297 U. S. 471, to show that an order of a state Public Service Commission constitutes a "statute within the meaning of the term as used in Title 28, U. S. C., Sec. 344 (a)," and these corporate appellees take no exception to that position but that case also holds that until Congress or a federal commission prescribes depreciation rates applicable to a business engaged in interstate commerce, the state commission may prescribe such rates. Said the court at page 478:

> "It cannot be supposed that Congress intended by the amendment to § 20 (5) to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates. (Authorities.) In *Smith* v. *Illinois Bell Teleph. Co.*, 282 U. S. 133, 139, 75 L. Ed. 255, 51 S. Ct. 65, this court pointed out that until the Interstate Commerce Commission has prescribed depreciation rates the prerogative of the state to regulate such rates cannot be gainsaid. (Authorities.)"

26. In the matter of *Connecticut Light & Power Co.*, Federal Power Commission Docket I. T-5665, an order was issued dated May 28, 1947 to implement the decision of this court in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515. The Commission had issued an order to the utility respecting the sale of electrical energy for consumption in the City of Bristol,

Mass., which energy had been transported into the state from Connecticut. In the order dated May 28, 1947 the commission found that "it is extremely doubtful" that the commission could lawfully issue the original order in the light of the decision of the Supreme Court in the case refetred to, because it purported to regulate the sale of the energy to ultimate consumers. The commission pointed out that the Federal Power Act "sprang in part from the desire of those seeking effective utility regulation to close the gap revealed by the *Attleboro* case. To that extent, the authority granted to this commission was designed to subserve its regulation of wholesale sales of electrical energy in interstate commerce *for re-sale.*" And, of course, the same thing is true with reference to the Natural Gas Act because the same gap existed with reference to natural gas which existed with reference to electrical energy and it was to close that one gap that the jurisdiction of the Federal Power Commission was defined as it has been by statute.

ARGUMENT

The purpose of this brief and particularly of this argument is to invite the court's attention directly to certain positions taken by appellant in its brief herein. We respectfully submit that the opinion of the Indiana Supreme Court shows that it was written with the greatest care, that the court carefully considered all applicable authorities and correctly applied them to the facts in this case. Perhaps it would be presumptuous for the corporate appellees to think they could improve on that presentation and it is for this reason that we address ourselves particularly to certain points made in the appellant's brief and to the authorities relied on by the appellant.

APPELLANT'S DISCUSSION OF THE BARRETT, ATTLEBORO AND LANDON CASES

State of Missouri ex rel. Barrett v. *Kansas Natural Gas Co.* (1924), 265 U. S. 298 has been cited and referred to twenty times in appellant's brief. Appellant has cited and referred to *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83 nine times. Both of these cases hold that the sale of interstate gas in the former, and electrical energy in the latter, for re-sale, are such an integral part of interstate commerce that, like transportation in interstate commerce, such business is not subject to state regulation. This has always been true, but such a holding has never been applied by the United States Supreme Court to sales to ultimate consumers. There is a difference between a business that *constitutes* interstate commerce and a business which, it may be assumed, *affects* interstate commerce. It was the holding in these two cases along with some other kindred cases that pointed up the necessity of giving Congress jurisdiction over sales for

re-sale in interstate commerce of both gas and electrical energy. There was no necessity for doing that in connection with the sale of these products to ultimate consumers. Regulation of these sales was always provided for in the police power of the state with reference to local matters until the Federal Government saw fit to intervene.

In the *Barrett* case, *supra*, which has been cited so many times by appellant and on which these corporate appellees have always relied because of what this court has said in explaining its holding in that sale for re-sale case, the court explained *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23 by stating at page 308:

> "There is nothing in *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, 64 L. Ed. 434, P. U. R. 1920E, 18, 40 Sup. Ct. Rep. 279, inconsistent with this view. There the Gas Company, a Pennsylvania corporation, transmitted gas from Pennsylvania into New York, and sold it directly to the consumers. The service to the consumers, which was the thing for which the regulated charge was made, was essentially local, and the decision rests upon this feature. Mr. Justice Day, in the course of the opinion, said: 'The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the state; nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.'"

In the instant case the gas after reaching Indiana is "sub-divided and sold at retail." Not only is the appellant sub-dividing and selling its gas at retail but it has declared its intention to continue to do this in every instance, and

in as many instances as, customers satisfactory to it can be found along its lines. In each case the gas is held in the state of consumption and can never find its way back into the high pressure mains which brought it into the state but will be held in the lateral lines until customers need it and use it, in other words, demand it. The appellant holds its gas in Indiana after it takes it from the transmission mains subject to the demands of local consumers, whether its lateral mains are few or many. The gas is held on demand subject, of course, to regulation from the Federal Power Commission with respect to its transmission or its sale for re-sale in interstate commerce.

In *Federal Power Commission* v. *Hope Natural Gas Co.* (1944), 320 U. S. 591, the court discussed what was involved in the *Barrett* and *Attleboro* cases. At page 609 it was said:

> "We pointed out in *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 506, 86 L. ed. 371, 376, 62 S. Ct. 384, that the purpose of the Natural Gas Act was to provide, 'through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' As stated in the House Report the 'basic purpose' of this legislation was 'to occupy' the field in which such cases as *Missouri ex rel. Barrett* v. *Kansas Natural Gas. Co.*, 265 U. S. 298, 68 L. Ed. 1027, 44 S. Ct. 544 and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, 71 L. Ed. 549, 47 S. Ct. 294, had held the States might not act. H. Rep. No. 709, 75th Cong. 1st Sess., p. 2. In accomplishing that purpose the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.' Id. p. 2. And the Federal Power

Commission was given no authority over the 'production or gathering of natural gas.'

"The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the *Kansas Natural Gas Co.* case and related decisions state commissions found it difficult or impossible to discover what it cost interstate pipeline companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. H. Rep. No. 709, supra, p. 3. Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe line transportation, had been acquired by a handful of holding companies. State commissions, independent producers, and communities having or seeking the service were growing quite helpless against these combinations. These were the types of problems with which those participating in the hearings were preoccupied. Congress addressed itself to those specific evils."

In *Harvard Law Review* for September, 1945, Vol. LVIII, No. 7, p. 1072 there is a philosophical discussion of the whole principle involved in this action. There the author said at page 1082:

"the court (U. S. Supreme Court) has forbidden taxation or price fixing of the first sale *if it is to a distributing company for resale,* even though the pressure of gas is reduced before entrance into the purchaser's pipes."

In the note in support of this statement the author cites *Missouri ex rel. Barrett* v. *Kansas Natural Gas Company* (1924), 265 U. S. 298; *State Tax Commission* v. *Interstate Natural Gas Co.* (1931), 284 U. S. 41. He says that the Interstate Natural Gas case

"condemned a privilege tax although the pressure was reduced before sale to distributors. Somewhat, similarly, reduction of the pressure before delivery to distributing companies was held not to put the company into local commerce in *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 398 (1942), note 30 supra. In 314 U. S. at 506, n. i., Mr. Chief Justice Stone quotes from the committee report on the proposed federal legislation, from which it is clear that the lines drawn by the Committee and assumed by it to be the lines drawn in Supreme Court decisions were between sales to consumers and sales for re-sale, with no mention of any significance to be attached to reduction of pressure."

At page 1084 of the Harvard Law Review article Prof. Powell says:

"So the court has been pretty consistent in finding localism in the consuming end"

of the transportation in interstate commerce of gas or electricity and its sale to ultimate consumers.

And finally at page 1089 Prof. Powell says that undoubtedly the state where the gas is sold to the ultimate consumer has jurisdiction over such sales

"because both rates and receipts are local and not interstate."

The above article by a scholar who is disinterested shows convincingly that Panhandle's position is not only unsupported by authority but by the logic of the situation as well.

We may be pardoned for referring to another discussion of the *Barrett* case by an impartial observer. In the note in 82 L. Ed. at page 1182 the author states:

"Likewise, a state may regulate the rates to be charged to consumers by a pipe line company bringing gas from without the state and selling it directly to

the consumers from its interstate main, and this whether the local distribution be made by the pipe line transporting company, or by an independent distributing company. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* (U. S.) supra."

Referring to *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83, that case was also explained in the quotation from the *Federal Power Commission* v. *Hope Natural Gas Co.* set forth above in connection with the discussion of the *Barrett* case.

It may be assumed the Federal Power Commission understood the holding in the *Attleboro* case to be as contended for by these appellees because of the language quoted in Point No. 26 of the summary of argument herein.

Connecticut Light & Power Company v. *Federal Power Commission* (1945), 324 U. S. 515 explains particularly the *Attleboro* case and the reason why Congress defined the jurisdiction of the Federal Power Commission as it did. The court in that case made the following statement: (p. 526)

"In reporting a revised bill to the Senate the Committee on Interstate Commerce said, 'Subsection (a) * * * declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State Commission.'

"The Report of the House Committee on Interstate and Foreign Commerce in presenting the amended bill called attention to *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, holding that rates charged in interstate wholesale transactions may not be regulated constitutionally by the states,

and expressed the purpose to give federal jurisdiction to regulate rates of wholesale transactions, but not to give jurisdiction over local rates. It said:

"'The bill takes no authority from State commissions and contains provisions authorizing the Federal Commission to aid the State commissions in their efforts to ascertain and fix reasonable charges.

"'* * * The new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State commissions. Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill.'

"'Subsection (b) confers jurisdiction upon the Commission over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce, but does not apply to any other sale of electric energy or deprive a State of any lawful authority now exercised over the exportation of hydroelectric energy transmitted out of the State. As in the Senate bill no jurisdiction is given over local distribution of electric energy, and the authority of States to fix local rates is not disturbed even in those cases where the energy is brought in from another State.'"

It may be pointed out that the Supreme Court in the above case attached importance to the report of a House Committee when that report was not only accepted by the House of Representatives but the bill was passed by the Senate as well and it was a report that had to do with the actual enactment of one of the very laws involved in the instant proceeding and it may be assumed that the members of the Congress knew what they intended to accomplish when they were defining the powers of the Federal Power Commission a decade ago.

In this connection it may be pointed out that appellant makes frequent reference to House Report No. 800 in the 80th Congress, First Session (pages 22, 51, 61, 62, 65 of appellant's brief). This report and the Congressional Record which contains a discussion of the report and the bill which it concerned (H. R. 4051 Congressional Record July 11, 1947, p. 8907 *et seq.*) show that they were sponsored by Representative Ross Rizley of Guymon, Oklahoma, of the firm of Rizley & Tryon and later of Rizley, Tryon & Sweet. This firm began listing the appellant in this case among its representative clients in the 1944 edition of a standard and recognized legal publication, i. e., Martindale-Hubbell Law Directory. This is not mentioned to question Mr. Rizley's employment but only to suggest that his observations may not be entitled to the same weight as they would have been if he had not been so employed. (See page 1377 of the 1943 edition, page 1407 of the 1944 edition and page 1802 of the 1947 edition of Martindale-Hubbell Law Directory.) Furthermore, what Mr. Rizley expressed in his report or in his bill of 1947 which has not become a law, is immaterial in connection with the interpretation of a bill which passed both Houses of Congress and was signed by the President of the United States, thus becoming the authoritative expression of the legislative branch of the government nearly a decade ago, and which has been interpreted on numerous occasions by the Supreme Court of the United States.

Of course, wherever the word "wholesale" is used in considering the jurisdiction of the Federal Power Commission it always means sale for re-sale because the Federal Power Act expressly so provides (Title 16, Section 824 (d) U. S. C. A.; C. 285, Sec. 201, Added Aug. 26, 1935, C. 687, Title II, Sec. 213, 49 Stat. 847). And the Federal Natural Gas Act only treats of two classes of sales, namely, sales

for re-sale which must include wholesale sales regardless of the size of the sale or to whom it is made, and other sales (Title 15, Sec. 717 (b) U. S. C. A.; C. 556, Sec. 1, 52 Stat. 821).

The case of *Public Utilities Commission* v. *Landon* is cited and referred to five times by appellant in its brief. It was a gas case. The *Barrett* case, *supra*, also explains the *Landon* case.

The court concluded its discussion of the *Pennsylvania Gas* case by saying:

> "The commodity, after reaching the point of distribution in New York, was subdivided and sold at retail." (p. 309.)

which is what the appellant is doing in Indiana and is purposing doing to an ever larger extent. Then the court said of the *Landon* case at page 309:

> "The *Landon* Case, so far as this phase is concerned, differs only in the fact that the process of division and sale to consumers was carried on, not by the Supply Company, but by independent distributing companies.
>
> "In both cases the things done were local, and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the *Landon* Case. *The business of supplying, on demand local consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains;* and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. But here the sale of gas is *in wholesale quantities, not to consumers, but to distributing companies for re-sale to consumers in numerous cities and communities in different states.*"

Pennsylvania Gas Co. v. *Public Service Commission*, 252 U. S. 23 also discusses the *Landon* case and various other cases in the following language:

> "We think that the transmission and sale of natural gas produced in one state, transported by means of pipe lines, and directly furnished to consumers in another state, is interstate commerce within the principles of the cases already determined by this court. (Citing several cases and authorities.)
>
> "This case differs from *Public Utilities Commission* v. *Landon*, 249 U. S. 236, 63 L. ed. 577, P. U. R. 1919C, 834, 39 Sup. Ct. Rep. 268, wherein we dealt with the piping of natural gas from one state to another, and its sale to independent local gas companies in the receiving state, and held that the retailing of gas by the local companies to their consumers was intrastate commerce, and not a continuation of interstate commerce although the mains of the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce, and, therefore, the matter was subject to local regulation."

So in the *Barrett*, *Attleboro* and *Landon* cases the court, of course, held that sales for re-sale were not subject to state regulation but sales to local consumers to satisfy the demand for the interstate product were subject to state regulation and it was immaterial so far as any of these cases show, how many local consumers were served or were to be served by the utility or how many pipes were to be extended from the high pressure gas transmission line or from the high voltage electric transmission line. Likewise, under both the Natural Gas Act and the Federal Power

Act the business of distributing the gas or electrical energy and the business of selling it to ultimate consumers are not to be regulated by the Federal Power Commission. The appellant seems to admit that the distribution of the gas or the electrical energy is to be regulated by the state commissions and there is no reason whatever for thinking that Congress intended or any one else intended that the process of selling the product to the ultimate consumer (which Congress has defined as a process distinct from distributing it or transmitting it or selling it for re-sale) should not also be regulated by the state commission. That is where the duty to regulate it would naturally be found until Congress sees fit to change it. It is submitted that it is difficult to understand why appellant has so frequently cited the *Barrett*, *Attleboro* and *Landon* cases where the Supreme Court has so clearly stated that they were decided as they were because they were instances of sale for re-sale and not sales to ultimate consumers, in other words, were not sales for use at the burner tips. It is these cases which, more than any other consideration, convinced Congress that this lone gap in the regulation of the electric and natural gas industries should be bridged and caused the Supreme Court to say in *Public Utilities Commission* v. *United Fuel Gas Co.* (1943), 317 U. S. 456 at page 467:

> "It is clear, as the legislative history of the Act amply demonstrates, that Congress meant *to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions.* The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. *Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere.* See H.

Rep. No. 2651, 74th Cong. 2d Sess. pp. 1-3; H. Rep. No. 709, 75th Cong. 1st Sess. pp. 1-4; Sen. Rep. No. 1162, 75th Cong. 1st Sess."

OTHER CASES CITED FREQUENTLY BY APPELLANT

Appellant cites six times *Pennsylvania* v. *West Virginia* (1923), 262 U. S. 553. That case held that natural gas is a lawful article of commerce which, of course, is true and it also held that a state where gas is gathered could not prevent a company from transmitting it to another state. The transmission of the gas is the very act of interstate commerce and a state could not regulate it, any more than it could regulate the sale of the article for re-sale but that does not even suggest that the state where it is sold for use at the burner tips could not, under its retained police power, regulate the distribution of the gas or its use at the burner tips even before the Federal Power Commission was given the jurisdiction it now possesses. If the cited case arose now the same result would be reached so far as the power of the state to regulate the shipment of the gas from one state to another is concerned because the *transmission* of the gas could not be regulated by the state. That function is now performed by the Federal Power Commission. In principle the case is the same as the *Barrett*, *Attleboro* and *Landon* cases.

Appellant cites and refers four times to *Arkansas Louisiana Gas Co.* v. *Department of Public Utilities* (1938), 304 U. S. 61. In that case the gas company which transported its gas in interstate commerce operated locally in many instances in Arkansas. The state commission ordered it to file reports, etc., involving all of its Arkansas operations. After discussing the various features of the company's business in Arkansas, the Supreme Court at p. 63 said "In

case the Department undertakes by some future action to impose what may be deemed unreasonable restraint or burden upon appellant's interstate business through rate regulation or otherwise that may be contested." From that mere statement Panhandle cites the case as an authority holding or suggesting that *any* effort of the state commission to impose a regulation affecting the interstate features of the business would necessarily be void even though the order did not concern transportation in interstate commerce or sale for re-sale; when the fact is that all the Supreme Court was suggesting was that if the state commission should later attempt to impose any *UNREASONABLE* restraint or burden on the company's interstate business through rate regulation or otherwise, that matter could be contested. Of course, that is true. Nobody suggests that any commission, state or federal, can impose any unreasonable restraint or burden on any kind of commerce —whether it be intrastate or interstate—and if such a thing is attempted the effort can be contested.

At page 36 appellant cites *Roland Electric Company* v. *Walling* (1946), 326 U. S. 657, 673, as holding that the term "wholesale" sales means sales "in wholesale quantities" and includes sales to industries for their own consumption as well as sales to distributing companies. From that it argues that since the sale to distributing companies is not subject to local regulation the sale to industrial companies should not be. But the point is that the Federal Natural Gas Act and the Federal Power Act cited *supra*, recognize only two classes of sales—sales for re-sale and all other sales. Certainly sales to industrial consumers for their own use at their burner tips are not wholesale sales under that definition. How large would a sale have to be before appellant would think that a sale should be treated as a sale for re-sale and not a sale for use at the burner tips? Congress did not purport to provide that one constitutional principle

should apply to the big fellow and another constitutional principle should apply to the little fellow.

Appellant cites and refers four times to *Walling* v. *Jacksonville Paper Co.* (1943), 317 U. S. 564 in which a distributor obtained in interstate commerce paper products to be sold to specified customers in a particular state and the sale was held to be "in commerce," so as to render the Fair Labor Standards Act applicable to the distributor's employees engaged in local distribution to consumers. This principle is not questioned. The court held the Federal Act was designed to apply to the workmen involved. In the instant case the federal statute provides, and the cas herein discussed hold, that the federal authority ***shall not*** apply to the circumstances under consideration.

Appellant cites six times *Southern Pac. R. Co.* v. *Arizona* (1945), 325 U. S. 761 and *Morgan* v. *Virginia* (1946), 328 U. S. 373 four times. Both of these cases involve only the very process of transportation of the product from one state to another and, of course, that process is and always has been subject to federal control and has not been subject to state control and since the Federal Power Commission was created it has been in fact controlled by that commission.

Baldwin v. *Seelig* (1935), 294 U. S. 511 is frequently cited. In that case the New York statute provided minimum prices for milk to be paid to producers in states other than in New York. The purpose was to protect New York producers from having to compete with cheaper prices paid to producers in other states. The court held that New York could not prescribe what should be paid to producers in other states. This would seem to be obvious but it is not a holding that New York could not regulate the rates

a public utility company might charge for service in New York to New York ultimate consumers.

Sioux City, Iowa v. *Missouri Valley Pipe Line Co.* (1931), 46 F. (2d) 819 is extensively quoted by appellant. Here the District Court of the Northern District for the Western Division in the State of Iowa held the interstate transporter of the gas occupied no public highway but certain private rights-of-way. It served gas only to certain privately owned packing companies and did not offer to sell and did not serve any other consumer. The selling company did not, as Panhandle has done, expect to serve or offer to serve consumers of natural gas generally so long as their business was large enough to make it interesting and sufficiently profitable to the selling company to come within the selling company's arbitrarily fixed standards. The transporting company's clientele was frozen from the beginning and it was so recognized by every one and these facts caused the court to hold that the transaction was not a public utility activity and therefore not subject to state regulation. The facts in the Iowa case are in direct opposition to the facts in the instant case.

Columbia Gas & Electric Corporation v. *U. S.* (C. C. A. 6, 1945), 151 F. (2d) 461 is cited several times. The court decided that certain creditors of a company in process of reorganization were entitled to preference over certain other creditors. The court did not consider whether a gas company could decide that it would only serve gas to selected customers and thereby avoid regulation either by the state or federal government. That matter was in no way involved in the decision of the case.

A

APPELLANT'S BUSINESS AND PROPOSED BUSINESS IN INDIANA IS A PUBLIC UTILITY BUSINESS AND SUBJECT TO REGULATION BY SOME PUBLIC AUTHORITY

Appellant's activities in Indiana surely come within the definition of a public utility which embraces every corporation that may own or operate *any* plant or equipment within the state for the production, transmission, delivery or furnishing of heat, light or power either directly or indirectly to or for the public. 54-105 Burns 1933.

So appellant's business is subject to regulation by the State Public Service Commission unless the commerce clause of the United States prevents, or unless Congress itself has asserted jurisdiction over sales other than sales for re-sale.

It seems to be admitted that the Federal Constitution permits the State Commission to exercise jurisdiction over the local distribution of gas or electrical energy even though such product has been brought directly from across state lines. Also it seems to be admitted that the statutes defining the power of the Federal Power Commission not only do not prevent but permit state regulation of *the distribution* of such gas or electrical energy. But it is contended that the Federal Constitution prevents the State Commission from regulating sales not for re-sale but to the ultimate consumer although the Federal Government has expressly refused to assume that burden; and although interstate gas or electrical energy may in principle be no more involved in the local sale to ultimate consumers than in the local distribution of the product; and although the process of local distribution and of sales other than sales for re-sale are referred to in the disjunctive in the Federal

statutes and treated as distinct processes but each subject to precisely the same statutory provisions. (U. S. C. A. Title 15, Sec. 717 (b); Title 16, Sec. 824 (b); Title 16, Sec. 824 (d).)

The quotation from *Industrial Gas Co.* v. *Public Utilities Commission of Ohio* (1939), 135 Oh. St. 408, 21 N. E. (2d) 166, in the Indiana Supreme Court Opinion at R. 212 shows that a corporation engaged in what the statute properly refers to as a public utility activity can not pick and choose its customers but must serve all the public which applies for service on reasonable terms. The language in *United Fuel Gas Co.* v. *Railroad Commission* (1929), 278 U. S. 300, 309 is determinative of that proposition.

> "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. An important purpose of state supervision is to prevent such discriminations."

See also *New York ex rel. N. Y. & Q. Gas. Co.* v. *McCall* (1917), 245 U. S. 345, 351.

Chapter 53 Acts 1945, p. 110 (Sec. 54-601a Burns Supp.) requires that a "Necessity Certificate" must be procured in Indiana before a gas utility can serve as a public utility in rural areas already being served as set forth in said Chapter 53. Also Sections 54-601, 54-603 and 54-604 Burns 1933 require that a utility must secure an Indeterminate Permit, or Certificate of Public Convenience and Necessity from the State Commission before it can compete with another utility operating under an Indeterminate Permit. Does appellant contend (and their position inevitably leads to the

contention) that the appellant has a right to go into any city in Indiana where a privately owned or municipally owned utility is rendering public service and take the cream of the business in that city simply because appellant brings its product from across state lines? Indiana does not lose its power to protect its citizens by the reasonable exercise of its police power merely because the appellant sees fit to transact business in several states or bring something into Indiana and sell it here to ultimate consumers. *Hooperston Canning Co. v. Cullen* (1943), 318 U. S. 313, 321. It is impossible to over estimate the consequences such a principle if given currency would bring not only to privately owned or municipally owned utilities in the state but to the whole theory of local self government.

It is submitted that the Federal Government has wisely left it to the State Commissions to protect the public locally against possible unfair treatment by public utilities. The distribution and sale of the gas locally is not transportation nor does it touch the state and its people so lightly that reasonable local regulation is inappropriate or interferes unconstitutionally with the commerce of other states. So long as the requirement is imposed reasonably without discrimination it is proper until the Federal Government intervenes. *Robertson v. California* (1946), 328 U. S. 440, 458.

But the point now is the Commission Order in question does not require that, at this time, appellant get a Necessity Certificate or a Certificate of Public Convenience and Necessity. The Commission ordered the appellant to file its rates, rules and regulations and make annual reports in addition to giving certain information on which further orders might be issued. These orders are just the sort of requirements that are made of every other utility in Indiana. It does not purport to go all the way at this time. Whether

a Certificate of Public Convenience and Necessity will be required is yet to be determined; and until it is known what other orders will be issued it can not be known whether they will conflict with the Federal Constitution or Statutes. *Rice* v. *Board of Trade*, 91 L. Ed. (13 Adv. Op.) 1058, 1062. (Official opinion not yet available.)

B

APPELLANT'S SALES TO ULTIMATE CONSUMERS IN INDIANA ARE SUBJECT TO REGULATION BY THE INDIANA COMMISSION BECAUSE CONGRESS HAS NOT AUTHORIZED THE FEDERAL POWER COMMISSION TO ASSUME THE BURDEN

One of the landmarks of our law is *Simpson* v. *Shepard*, (Minnesota Rate Cases) 230 U. S. 352. It holds that many activities affect interstate commerce but are nevertheless subject to state regulation. We would not set forth extensive quotations from this case but at page 402 the court said:

> "Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; * * * Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress

has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal Power."

Illinois Natural Gas Company v. *Central Illinois Public Service Company* (1942), 314 U. S. 498 is a particularly important case. It is respectfully suggested that it is decisive of the questions involved herein. It explains the *Landon*, *Barrett* and *East Ohio Gas Company* cases previously referred to herein. The Indiana Supreme Court quotes from this case at record 209. At page 505 of the Supreme Court Report it is said:

"In other cases the Court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce." (Authorities.)

Pennsylvania Gas Co. v. *Public Serv. Commission* (1920), 252 U. S. 23, has heretofore been discussed in some detail. It is a leading case and has caused appellant much concern in these proceedings. In that case interstate gas was sold to the ultimate consumer. There was no evidence of how many reduced pressure pipe lines were used or how many ultimate consumers were served by the Pennsylvania Company in New York. The court holds (p. 31) that such service "while a part of an interstate transmission, is local in its nature, * * * This local service is not of that character which requires general and uniform regulation of rates by congressional action, * * *. It may be conceded that the local rates may affect the interstate commerce of the company. But this fact does not prevent the state from making local regulations of a reasonable character."

The *Pennsylvania* case was before Justice Cardoza on its way to the Supreme Court. In *Pennsylvania Gas Co.* (1919), 225 N. Y. 397, P. U. R. 1919C 663, 122 N. E. 260 at pages 262 and 263 Justice Cardoza gave in the most forceful way the reason why consumption or the sale to ultimate consumers is subject to state regulation until the Federal Government enters the field, while sales to distributing companies and transportation in interstate commerce are national in character and must be regulated nationally if they are to be regulated at all. Accordingly this case helped to point up the necessity for the creation of the Federal Power Commission with the jurisdiction it now has and the Supreme Court accepted the reasoning of Justice Cardoza. (252 U. S. 23, p. 31.)

In *Southern Natural Gas Corporation v. Alabama* (1937), 301 U. S. 148, the utility company sold interstate gas to one industrial ultimate consumer in Alabama (the other sales in Alabama were to three distributing companies and obviously were not local and not subject to state regulation or taxation). The sales to the one local industrial ultimate consumer were held to constitute local business and to be subject to state regulation and taxation so that a franchise tax could be imposed on the importer and must be paid as a condition precedent to selling the interstate product to one local industrial ultimate consumer. Said the court at page 155:

> "We perceive no essential distinction in law between the establishment of such a local activity to meet the needs of consumers in industrial plants and the service to consumers in the municipalities which was found in the *East Ohio Gas Co.* case to constitute an intrastate business."

The *East Ohio Gas Co.* v. *Tax Commission* (1931), 283 U. S. 465 declared that the sale of interstate gas to the

ultimate consumers in that case was intrastate commerce and was subject to local taxation. It is an important case in the development of the principles for which we contend. If the franchise tax the State of Alabama imposed in the *Southern Natural Gas Corporation* case and the excise tax the State of Ohio imposed in the *East Ohio Gas* case were held to be legal, certainly a local police regulation of the kind under consideration in the case at bar would *a fortiori* be proper. *In re Freeman* v. *Hewit*, 91 L. ed. (No. 3. Adv. Op.) 205 at page 208. (Official opinion not yet available.)

We would again emphasize that the effort of appellant to place sales to domestic or commercial ultimate consumers in another and distinct category finds no justification either on principle or in the statutes or the decided cases. In *Colorado Interstate Gas Co.* v. *Federal Power Commission* (1945), 324 U. S. 581, 596, the court said:

> "Industrial consumers are as much a part of the 'public' as domestic users and other commercial users. And distribution to one is as ultimate as the distribution to the others."

We also cite *State* v. *Prudential Insurance Co.* (Ind. Dec. 21, 1945), 64 N. E. (Adv. Op.) (2d) 150 which is not yet officially reported. This case was later affirmed in the United States Supreme Court. *Prudential Insurance Co. of America* v. *State of Indiana* (1946), 328 U. S. 823. At page 151 the Indiana Court quoted as being decisive of the question there presented the opinion of this court in *United States* v. *Southeastern Underwriters Association*, 322 U. S. 533. The Indiana Court italicized the following portion of this court's opinion in the *Southeastern Underwriters Association* case:

> ***"It is settled that, for constitutional purposes, certain activities of a business may be intrastate and***

therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why in the continued absence of conflicting Congressional action the state regulatory and tax laws should be declared valid."

This court declared the same principles in *Prudential Insurance Co.* v. *Benjamin* (1946), 328 U. S. 408, a tax case, and in *Robertson* v. *California* (1946), 328 U. S. 440 which upheld a California law regulating the transaction of interstate insurance business, in California and in which the Supreme Court said (p. 461) it would have reached the same result if the McCarren Act had not been passed.

CONCLUSION

We respectfully submit that the statement of this court in *Connecticut Light & Power Company* v. *Federal Power Commission* (1945), 324 U. S. 515 at page 530 fully applies to the circumstances in the case at bar and clearly indicates the result that should be reached. There this court said:

"But state lines and boundaries cut across and subdivide what scientifically or economically viewed may be a single enterprise. Congress is acutely aware of

the existence and vitality of these state governments. It sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a Federal plan is thereby sacrificed. Congress may think it expedient to avoid clashes between state and Federal officials in administering an act such as we have here. Conflicts which lead state officials to stand shoulder to shoulder with private corporations making common cause of resistance to Federal authority may be thought to be prejudicial to the ends sought by an act and regulation more likely to be successful, even though more limited, if it has local support. Congress may think complete centralization of control of the electric industry likely to overtax administrative capacity of a Federal commission. It may, too, think it wise to keep the hand of state regulatory bodies in this business, for the 'insulated chambers of the states' are still laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving a whole national industry in every experiment."

We see no escape from the conclusion that the completely selfish interpretation given by Panhandle to our State and Federal laws providing for the regulation of the different phases of the natural gas and electrical energy industries finds no support in any of the decided cases or in any recognized principles of law applicable to the situation. We again say the undisputed facts in this case show that continued efficient service to domestic, commercial and small industrial users of natural gas and ultimately to large users of natural gas as well, in Indiana and all the other states, will be placed in jeopardy if Panhandle is permitted to pick and choose its customers and to serve or refuse to serve those it pleases without regulation from any source. If this can be done as to interstate gas it can be done as to interstate electrical energy and thus state regulation of all

such utility service is placed in jeopardy whether it be in cities and towns or in rural areas.

If Panhandle's position is correct, therefore, all distributing companies and all municipalities engaged in the gas or electric business, in their sales to ultimate consumers, are subject to unbridled competition from these transporting companies whose sales of gas or electrical energy for re-sale would alone be subject to any regulation and that regulation would have to be provided by the Federal Power Commission. It is only necessary to point to the effect of accepting Panhandle's startling position to realize how revolutionary this contention is.

We find no support in the evidence or in the law for appellant's position in this appeal and respectfully urge that the decision of the Indiana Supreme Court be affirmed.

Respectfully submitted,

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